IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 673

ROY L. WILLIAMS et al.,
Petitioners,

vs,

THE COOPERATIVE FARM CHEMICALS ASSOCIATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Kansas.

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To the Supreme Court of the State of Kansas.

Petitioners pray that a writ of certiorari issue to review the final judgment of the Kansas Supreme Court entered in the above entitled proceedings on December 21, 1959.

CITATIONS TO OPINIONS BELOW.

The memorandum opinions of the District Court of Douglas County (R. 28-38)* and of Montgomery County, Kansas (R. 60-64) are unreported and printed in Appendix A, *infra*, p. 11, and Appendix B, *infra*, p. 20. The opinion of the Kansas Supreme Court (R. ....) is reported in 185 Kan. 410, ... P. 2d ...., and is reprinted

* The certified record filed in this proceeding consists of various printed documents attached to legal-sized sheets of paper carrying the stamped page references "1" through "10." For the convenience of the Court, Petitioners have numbered each page of the record including the pages of printed documents consecutively. The record references in this petition are to the consecutive pagination appearing on the lower right hand corner of each page.

in Appendix C, *infra*, p. 24. As will be more fully explained in the statement of the case, this proceeding was treated as a single cause in the court below although it technically involved two separate actions. This petition seeks review of the single judgment of the Kansas Supreme Court which controls the disposition of both proceedings.

JURISDICTION.

The Kansas Supreme Court on November 7, 1959, entered its mandate reversing the judgments of the District Courts of Douglas (R. 42-46, App. D and E, *infra*, pp. 39, 41) and Montgomery (R. 60-64, 67-70, App. F. and G, *infra*, pp. 43, 45) Counties which awarded damages to the Petitioners, sustained Petitioners' demurrer to the Respondents' evidence, and dismissed Respondents' petitions for an injunction. A timely motion for a hearing was filed on November 25, 1959 (R. 242), and denied without opinion on December 21, 1959 (R. 260).

Comprehensive and detailed stipulations of fact were entered into between the Petitioners and Respondents and submitted to the District Court of Douglas and Montgomery Counties thus providing the courts with a complete factual record upon which to make their rulings concerning the legality of the Petitioners' conduct and the jurisdiction of the state courts (R. 24-26, 57-60). There are no disputed issues of fact presented by the record in this case. The Supreme Court of the State of Kansas considered the legality of Petitioners' conduct under state law and held such conduct to be unlawful (R. 234). The sole contention urged by Petitioners, in the state courts (R. 26-28, 234) and in this Court, is that exclusive jurisdiction over the subject matter of the proceedings is vested in the National Labor Relations Board. This contention was sustained by the District Courts for Douglas and Montgomery Counties (R. 37-38, 64-65) but was rejected by the Kansas Supreme Court (R. 240).

Thus, the state courts, based upon a complete factual record, have held the Petitioners' conduct to be unlawful under state law. The state supreme court has rejected the Petitioners' contention that federal pre-emption bars state action. In these circumstances, "the federal question is the controlling question; 'there is nothing more to be decided.' [*Clark v. Willard*, 292 U. S. 112, 118]." *Pope v. Atlantic Coast Line Ry. Co.*, 345 U. S. 379, 382. See also: *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 73-74.

The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1257 (3).

QUESTION PRESENTED.

Whether a state court has jurisdiction to enjoin peaceful picketing occurring in the course of a labor dispute affecting interstate commerce where, as here, the picketing is conducted at the premises of an allegedly "neutral" corporate employer, owned by and operated under common management with the corporate employer involved in a primary dispute with the picketing union.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8 and Article VI, Section 2 of the United States Constitution. They are reprinted in Appendix I, *infra*, p. 47. The statutory provision involved is Section 8 (b) (4) of the National Labor Relations Act as Amended, 61 Stat. 136, 29 U. S. C., Sec. 158 (b) (4). This statutory provision is also reprinted, in material part, in Appendix I. Since this case arose prior to the effective date of the amendments made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, the subsequent amendments are not reflected in the statute as reproduced in Appendix I.

STATEMENT.

Petitioner, Local Union No. 41 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization having its offices in Kansas City, Missouri (R. 6). Petitioner, Roy L. Williams, is the president and business representative of Teamsters Local 41 (R. 6). The remaining individual Petitioners, Cecil H. Bennett, Stan Clevenger, Bert Clouse, Ben Bigler, Donald Diels, Lee Blankenship, Jack Williams, Paul Boyd, Raymond Holmes, Oliver Ison, George Maxfield, Alvin Reetz, W. D. Robinson, Robert Shoemaker, Gaylord Stauffer, and Kenneth Zeller, are either officers, stewards or members of Teamsters Local 41 (R. 6). The Petitioners are herein collectively referred to as the "Union."

The Respondent, Cooperative Farm Chemicals Association, is a Kansas corporation located on the outskirts of Lawrence, Kansas (R. 5-6). It is engaged in the manufacture and distribution of farm chemicals (R. 7-8). The employees of the Cooperative Farm Chemicals Association are represented by the Oil and Chemical Workers International Union (R. 7).

Consumer Cooperative Association is a Missouri corporation, located in Clay County, and is engaged in the sale of farm supplies (R. 8). It employs approximately 65 drivers and warehousemen represented by the Petitioner Union (R. 8). On April 22, 1958, the Union went on strike against Consumer Cooperative Association in support of demands for a new collective bargaining agreement (R. 9-10).

Consumer Cooperative Association owns approximately 75% of the common stock of Respondent Cooperative Farm

Chemicals Association, and the two corporations have the same president (R. 24). The business of these corporations affects interstate commerce and is sufficient to meet the jurisdictional standards of the National Labor Relations Board (R. 25).

On May 5, 1958, the Petitioner Union, in support of its dispute with Consumer Cooperative Association, commenced picketing at the premises of Cooperative Farm Chemicals Association (R. 10-11). The employees of Cooperative Farm Chemicals Association, who are represented by the Oil and Chemical Workers International Union, continued to work. Trucks owned by Consumer Cooperative Association and driven by non-striking employees continued, in the regular course of business, to make pick-ups at the premises of Cooperative Farm Chemicals Association (R. 25). However, many truck drivers employed by various common carriers declined to cross the picket line (R. 11-12).

Following the commencement of the picketing at its premises, Cooperative Farm Chemicals Association commenced a proceeding to restrain the picketing contending that the picketing was unlawful under Kansas "General Statute" (1957 Supp.) 44-809 (13), which provides that "it shall be unlawful for any person . . . to picket beyond the area of the industry within which a labor dispute arises" (R. 13). Petitioner Union filed a demurrer to the injunction proceeding urging, as its sole defense, the contention that exclusive jurisdiction over the subject matter of the dispute was vested in the National Labor Relations Board (R. 26-28). In order to provide the court with a complete factual record, the parties entered into a comprehensive stipulation of fact setting forth the relevant interstate commerce data, describing the common ownership and management of the two corporate employers, and defining

the circumstances out of which the picketing arose and the manner in which it was conducted (R. 24-26).

The trial court, after considering the evidence, ruled that, while the picketing was unlawful under the state law (R. 31), subject matter jurisdiction was vested exclusively in the National Labor Relations Board (R. 37-38). It therefore sustained Petitioners' demurrer and dismissed the Respondents' petition for an injunction (R. 37-38). In addition to its costs, the Petitioner Union was awarded $500 damages, the reasonable value of attorneys' fees expended in resisting the proceeding (R. 45-46).

Petitioner Union in support of its dispute with Consumer Cooperative Association also engaged in peaceful picketing at the premises of Respondent Cooperative Refinery Association. This picketing prompted a second injunction proceeding against the Petitioner Union. Cooperative Refinery Association is also owned by Consumer Cooperative Association and they have the same president (R. 58-60). The second action, *Cooperative Refinery Association v. Williams*, was heard on pleadings and stipulation which were virtually identical to those in the first action, *The Cooperative Farm Chemicals Association v. Williams*. As in the first case, the trial court sustained the Petitioner Union's claim of federal pre-emption.

On appeal to the Kansas Supreme Court, the two cases were consolidated and treated as a single cause. It was stipulated between counsel, that the court's ruling in *Cooperative Farm Chemicals Association v. Williams et al.*, would control the case entitled *Cooperative Refinery Association v. Williams* (R. 5, 48). Since both cases arise out of essentially identical factual circumstances, present precisely the same legal issue, and were treated as a single proceeding in the court below, only one petition for writ

of certiorari is being filed. The petition for certiorari seeks review of the judgment in both cases.

On appeal, the Kansas Supreme Court held that the picketing was unlawful under state law because it was not limited to "the area of the industry within which" a labor dispute existed (R. 234). It also held, contrary to the trial courts, that the doctrine of federal pre-emption was inapplicable in the circumstances of this case.

The Kansas Supreme Court, relying on *J. G. Roy & Sons Co. v. NLRB*, 251 F. 2d 771 (C. A. 1), a case holding picketing conducted in circumstances closely analogous to those in the case at bar to be unlawful under Sec. 8 (b) (4), concluded that the picketing in this case was not "protected" under the National Labor Relations Act (R. 238). The court below, however, held that the picketing did not seek to induce a concerted work stoppage and therefore was not "prohibited" by the National Labor Relations Act. The court below added, as an alternative ground, the finding that the corporations involved in the instant case were not "doing business" with one another as defined in Sec. 8 (b) (4) of the National Labor Relations Act. On this basis, the *J. G. Roy & Sons* case was distinguished from the case at bar (R. 240). The court below concluded that since the picketing was neither protected or prohibited by federal law, the state retained jurisdiction to enjoin the picketing.

The Kansas Supreme Court reversed the judgments for damages awarded in favor of the Petitioner Union and entered its mandate directing the trial courts to enter judgment in favor of the Respondents.

HOW FEDERAL QUESTION IS PRESENTED.

Petitioners' demurrers to the injunction proceedings affirmatively alleged that jurisdiction over the subject matter of the dispute was vested exclusively in the National Labor Relations Board (R. 26-28, 60). This contention was considered and sustained by the trial courts (R. 37-38, 63-64). On appeal, the contention was considered but rejected by the Kansas Supreme Court (R. 240).

REASONS FOR GRANTING THE WRIT.

1. The court below has asserted jurisdiction to enjoin peaceful picketing occurring in the course of a labor dispute affecting interstate commerce, contrary to the repeated declarations of this Court that such picketing is subject to the exclusive jurisdiction of the National Labor Relations Board. E. g., *Garner v. Teamsters*, 346 U. S. 485, 499-500.

2. The circumstances out of which the picketing in this case arose present a difficult and unsettled question under the National Labor Relations Act; namely, whether a union may lawfully picket at the premises of each employing unit of a commonly owned and managed corporate complex in support of a primary dispute which one unit of the complex. The court below, in concluding that the picketing was not protected under the National Labor Relations Act, relied upon the decision in *J. G. Roy & Sons Company v. NLRB*, 251 F. 2d 771. However, the court below ignored the fact that this decision reversed the Board's findings that the picketing involved was lawful. The same problem also prompted conflicting conclusions in *Teamsters Local 688 (Bachman Machine Company)*, 121 NLRB 1229, *reversed* 266 F. 2d 599 (C. A. 8). Both the *Roy & Sons* case and the *Bachman Machine* case involved picket

ing, in support of a primary dispute, conducted at the premises of an allegedly neutral, but commonly owned and managed, employer. In both cases the National Labor Relations Board found no violation of the Act; but, in both cases, the courts of appeal held that the picketing violated Sec. 8 (b) (4) (A). In such circumstances, it is clear that the picketing in this case "is arguably subject to section 7 or section 8 of the Act;" hence, the dispute was within "the exclusive competence of the National Labor Relations Board." *San Diego Building Trades v. Garmon*, 359 U. S. 236, 245.

3. The court below attempted to avoid the impact of the pre-emption doctrine by finding as a fact that the picketing did not seek to induce a concerted work stoppage prescribed by Sec. 8 (b) (4), relying particularly upon the fact that no work stoppage of the production employees of the allegedly neutral employer occurred. This, too, typically presents a close question upon which the Board and federal courts of appeal often times disagree. E. g., *Bakery & Confectionery Workers Local 50*, 115 NLRB 1333, *reversed*, 245 F. 2d 542 (C. A. 2).

Similarly, the court's alternative finding that the two corporations involved were not doing business within the meaning of Sec. 8 (b) (4) involves a factual inquiry peculiarly within the jurisdiction of the Board. Since it is stipulated that drivers employed by the struck employer, Consumer Cooperative Association, continued to make pick-ups "in the usual course of business" (R. 25) at the premises of Cooperative Farm Chemicals Association, the allegedly neutral employer, it is obvious that the Board could find that the two corporations were doing business within the meaning of the Act.

In any event, however, "it is not necessary or appropriate for us to surmise how the National Labor Relations Board

might have decided this controversy had petitioner presented it to that body. The power and duty of primary decision lies with the Board, not with us." *Garner v. Teamsters*, 346 U. S. 485, 489. See also: *Weber v. Anheuser-Busch*, 348 U. S. 468, 478; *Local Union No. 25 v. New York, New Haven Railroad Co.*, 350 U. S. 135, 161.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A.

Memorandum Decision.

(District Court for Douglas County.)

This action was filed on May 9, 1958, on which date defendants were restrained from acts complained about pending a hearing on May 20, 1958, on plaintiff's application for a temporary injunction. On May 20th the parties appeared by counsel and informed the Court they had agreed to submit the matter on an agreed statement of facts without oral argument, such agreed facts and the briefs of the parties in support of their respective contentions to be filed on or before May 31st, to which date the matter was thereupon continued. The papers subsequently filed consist of: Stipulation of Facts; Defendants' Demurrer to the Evidence; Brief in Support of Defendants' Demurrer to the Evidence; and Petitioner's Brief in Opposition to Defendants' Demurrer. The matter so submitted was, on May 31st, taken under advisement for decision. It was understood and agreed on May 20th that the restraining order would remain in effect pending the Court's decision on the matter to be submitted.

In view of the manner in which this matter has been submitted, the allegations contained in plaintiff's petition and the affidavit filed in support thereof, together with the facts contained in the stipulation, constitute the plaintiff's evidence. Defendants' demurrer to such evidence is on the ground that such evidence shows that this Court is pre-empted by the federal Labor Management Relations Act and is therefore without jurisdiction.

The facts developed by plaintiff's evidence are as follows:

1. The Consumers Cooperative Association, hereinafter referred to as the Association, is a corporation principally engaged in Clay County, Missouri, in the purchase, sale and distribution of home and farm supplies to retail farmer cooperatives in approximately nine midwestern states. The Association's employees are members of and represented by the Teamster's Union. The labor contracts with the Teamster's Union affecting the employees of the Association expired on March 31, 1958. Negotiations prior and subsequent to that date not producing an agreement, a strike was called on April 18, 1958. Thereafter both the warehouse and general office building of the Association have been picketed in Clay County, Missouri, by members of the Teamster's Union who carry placards stating: "Truck Drivers and Warehousemen on Strike Against C. C. A., Kansas City, Missouri."

2. Plaintiff is engaged in the manufacture, processing, storage, distribution and handling of agricultural chemicals and fertilizers, at its plant one mile east of Lawrence on highway 10 in Douglas County, Kansas. Plaintiff's employees are members of and represented by Local Union No. 5-613 of the Oil, Chemical and Atomic Workers International Union (AFL-CIO). The contract between plaintiff and said Union covering plaintiff's employees is to remain in effect until of subsequent to November 1, 1958. There is no dispute between plaintiff and any of its employees nor do defendants or the Teamster's Union seek to represent any of plaintiff's employees at its plant or otherwise to bargain or present any demands with respect to wages, hours or working conditions of such employees.

3. The Association owns 75% of the common stock of plaintiff; the same person who is president of the Association is also president of plaintiff, and the personnel director of the Association joined in the execution of the labor contracts hereinabove described both for the Association and for the plaintiff. That after the employees

of the Association went on strike and pickets were placed at its places of business in Clay County, Missouri, the Association transferred various units of its trucking equipment previously principally stationed at its warehouse and terminal in Clay County, Missouri, to other locations within the state of Kansas and elsewhere but none of such truck units was transferred to any place within Douglas County, Kansas. During normal operations and prior to the strike and picketing against the Association, a number of the aforesaid trucking units of the Association in the usual course of business picked up some merchandise at plaintiff's place of business and some of said truck units are continuing to make such pickups.

4. That plaintiff is engaged in interstate commerce and the volume of its interstate business exceeds the minimum below which the National Labor Relations Board would refuse to entertain a complaint or assert its jurisdiction.

5. That on May 5, 1958, defendants came to plaintiff's plant and began picketing the entrances thereto carrying placards stating: "Truck Drivers and Warehousemen on Strike against C. C. A., Kansas City, Missouri." That as a result of such picketing, the drivers of interstate trucking lines and others, including drivers of the Association's truck units transferred to Kansas, have refused and are refusing either to deliver shipments to or obtain shipments from plaintiff's premises causing substantial and irreparable damage to plaintiff which damage will continue as long as said picketing is permitted at its premises.

6. That there is no act, offer or concession, or other agreement involving the defendants, which plaintiff could make or do insofar as plaintiff's employees at its Douglas County, Kansas, plant are concerned or with respect to any matter whatsoever that would solve or affect in any way the picketing presently being carried on at said location by defendants.

7. That the acts of defendants in addition to being otherwise unlawful, are in violation of Kansas, G. S. 1949, 44-809 (13).

By their demurrer to plaintiff's evidence, defendants admit the facts developed by such evidence but contend that such facts show that this Court is without jurisdiction, it having been pre-empted by the Labor Management Relations Act, often referred to as the Taft-Hartley Act (29 U. S. C., Sec. 141, *et seq.*), and hereinafter referred to as the Act.

Defendants take the position that the conduct about which plaintiff complains is either protected or prohibited by the Act, in either of which cases this Court is pre-empted.

Plaintiff, on the other hand, contends that defendants' conduct is neither protected nor prohibited by the Act and that unless this Court assumes jurisdiction plaintiff is without remedy for defendants' alleged wrong. That in such cases the U. S. Supreme Court has held that a state court may act (*International Union v. Wisconsin Employment Rel. Bd.*, 336 U. S. 245.) Having thus disposed of the jurisdictional question involved, plaintiff then attempts to show by means of cases which do not involve the pre-emption issue here involved, that the state is free to act (See for example: *Carpenters Union v. Ritters Cafe*, 315 U. S. 722; *Gibonev v. Empire Storage & Ice Co.*, 336 U. S. 490; and *Hughes v. Superior Court*, 339 U. S. 460).

In considering the respective contentions of the parties, I think we must begin with general rules and then try to analyze plaintiff's evidence in light of these rules to reach a decision. In 31 Am. Jur. 844, Sec. 572, it is stated that: "The general rule is that a state court has no power to grant injunctive relief against picketing affecting inter-

state commerce, where it constitutes an unfair labor practice within the scope of Sec. 8 (b) of the Labor Management Relations Act and does not involve violence or other conduct of such nature that the state court should have power to restrain it in the interest of public safety and welfare. * * * On the other hand, the power of state courts to enjoin peaceful picketing is sustained where the union conduct involved is neither forbidden nor protected by the federal act". (See also: 32 A. L. R. 2d 1032, 1030).

In commenting upon the intent of Congress in passing the Act, the U. S. Supreme Court said in *Garner v. Teamsters et al.*, 346 U. S. 485 at 490: "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." The court went on to say at page 499, "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained (sic) by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the

state were to declare picketing free for purposes or by methods which the federal Act prohibits".

The difficulty which a case of the kind here under consideration presents is commented upon in the opinion of the U. S. Sup. Ct. in the case of *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 75 S. Ct. 480 at page 488, as follows: "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delineation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion by state action. Such was the situation in *Garner v. Teamsters Union*, *supra*. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much'. 346 U. S. at page 488, 74 S. Ct. at page 164. This penumbral area can be rendered progressively clear only by the course of litigation".

Since the decisions in the Garner and Weber cases, the U. S. Sup. Ct. has consistently construed the Act in such a way that the area in which state courts may enjoin labor activity which affects interstate commerce is virtually limited to those situations which require the exercise of the state's police power to prevent violence and the like. (See for example: 31 Am. Jur. 844, 845, Sec. 572, and the cases cited in footnotes 7, 8, 9 and 10 on p. 845, and footnotes 13, 14, 15, 16, 17, 20 and 2 on p. 846). The only exceptions to the above rule, in the cases I have been able to find are those listed in Sec. 3 of the annotation in 32 A. L. R. at 1030, as supplemented in the Blue Books. But

none of these cases is remotely close to the factual situation presented in the case here at issue.

Plaintiff would have the Court ignore the possibility that plaintiff is far from being a neutral employer and would request that defendants be enjoined because the activity complained about is prohibited by Kansas Law. How, in view of the Garner and Weber cases, may the State prohibit picketing which plaintiff contends is not prohibited by the Act?

Admittedly defendants neither represent, nor do they seek to represent plaintiff's employees. Defendants' dispute is with the Association which owns control of plaintiff and is otherwise in a position to dominate plaintiff's course of action. Certainly by picketing plaintiff, defendants are effectively preventing the flow of plaintiff's products into interstate as well as intrastate commerce, thereby effectively putting pressure upon the Association against whom the primary strike is directed. By preventing drivers of interstate and intrastate trucks from entering plaintiff's premises to leave or pick up products, etc., defendants could be operating in an area protected or left free by the Act, if the picketing is held to be against a non-neutral employer (See *NLRB v. Int. Rice Milling Co.*, 341 U. S. 665; and the comment thereon in *NLRB v. Service Trade Chauffeurs, etc.*, 191 F. 2d 65 at 67, and in 112 NLRB 348).

As has been mentioned, plaintiff contends that defendants' picketing of plaintiff's premises is neither protected nor prohibited under the Act. In its brief, plaintiff points out that the only possible part of the Act which prescribes protected activities under which defendants' picketing could be deemed protected, is that described as "concerted activities for * * * other mutual aid or protection" as declared in the final phrase of Sec. 7 of the Act. And this part of the Act, plaintiff contends, could not possibly per-

tain to defendants' picketing of plaintiff's premises. In view of the broad construction which has been placed upon the phrase above mentioned, it is possible that plaintiff's contention in respect thereto, could be wrong. For example see: 31 Am. Jur. 527, Sec. 189, where it is said in part: "The National Labor Relations Board and the courts have given a broad interpretation to the 'concerted activities' on the part of employees which are protected by the statute. Since such activities are not confined to the purposes of collective bargaining but also include activities for 'other mutual aid or protection', it has been held that protected activities include almost everything in which the employees could be found to have a legitimate interest. * * * The term 'concerted activities' applies to any group action by several or more employees for the legitimate furtherance of their common interests as such, and the express direction of it to the purpose, among others, of collective bargaining seems to extend the right of recalcitrance to any form of legitimate pressure upon the employer calculated to obtain favorable results, including strikes, and all lawful coercive measures to make them effective". (See also: A. L. R. 2d 416 at 433.) In this connection defendants contend that in view of the Association's financial and managerial control over plaintiff, defendants' picketing applies legitimate pressure inasmuch as plaintiff is not a neutral employer. In fact, defendants contend, that plaintiff is in effect aiding the Association by permitting the units of its equipment which were transferred from the struck plant, to continue to make pick-ups of merchandise at plaintiff's plant.

I have examined Sec. 8 of the Act as well as comment and annotation upon the subject of secondary boycott and find it difficult to determine whether or not defendants' picketing of plaintiff's plant or the consequent stoppage of interstate truckers constitutes activity prohibited by said section (See annotation in: 16 A. L. R. 2d 769; also *NLRB*

v. Int. Rice Milling Co., 341 U. S. 665; *NLRB v. Serv. Trade Chauffeurs etc.*, 191 F. 2d 65 at 67; 142 NLRB 348; *Wichita Falls & S. R. Co. v. Int. Ass'n of Machinists* (Tex. Civ. App.), 266 S. W. 2d 265; and *Douds v. Int. Longshoremen's Ass'n*, 224 F. 2d 445).

Although the facts developed by plaintiff's evidence fail clearly to disclose activity which is either protected or prohibited by the Act, I am convinced that such evidence gives rise to sufficient doubt that it is not so protected or prohibited as would warrant a finding that the activity complained about, if not prohibited, might reasonably have been intended to be protected under the Act. And under the decision of the *Garner* and *Weber* cases, *supra*, adhered to by the Kansas Supreme Court in the case of *Kaw Paving Co. v. Int. Union of Op. Eng.*, 178 Kan. 467, this Court must decline jurisdiction and dismiss the proceedings brought by plaintiff. Judgment in accord with this memorandum decision will be entered on the next motion day, October 3, 1958.

Signed and dated at Lawrence, Kansas, on September 19, 1958.

/s/ Frank R. Gray,
District Judge

APPENDIX B.

Memorandum Decision.

(District Court for Douglas County).

The question is one of jurisdiction of the court and arises on the demurrer of the defendant to the evidence and the briefs of the parties in support of their respective contentions.

The evidence is uncontroverted and is agreed by the parties to consist of those facts alleged in the petition and those stated in the stipulation of facts filed herein.

Among other things it is agreed:

1.

The Consumers Cooperative Association of Clay County, Missouri, owns the common stock of the plaintiff corporation, the Cooperative Refinery Association; the same individual, Mr. Howard A. Cowdan, is President and General Manager of the former and is President of the latter.

2.

On behalf of plaintiff company the collective bargaining contracts currently in effect between plaintiff and the various local unions representing all its employees, not including Local Union 41 of the Teamsters Union, were executed by Mr. Cowdan and others.

3.

Mr. Cowdan also, with others, executed on behalf of the Consumers Cooperative Association of Clay County, Mis-

souri, the contract entered into by it and Local No. 41 of the Teamsters Union, which contract expired March 31, 1958.

4.

The plaintiff is engaged in interstate commerce, the volume of which exceeds the minimum below which the National Labor Relations Board would refuse to assert jurisdiction.

5.

Local No. 41 of the Teamsters Union is currently engaged in a strike at the plant of the Consumers Cooperative Association in Clay County, Missouri.

6.

That on May 7, 1958, defendants caused pickets to be stationed at plaintiff's plant in Coffeyville, Kansas, carrying placards giving notice of the strike in Kansas City, Missouri; that as the result of such picketing the drivers of interstate trucking lines, and others, including drivers of the Association Truck Unit, transferred to Kansas, have refused and are refusing either to deliver shipments or to obtain shipments from plaintiff's premises, causing substantial and irreparable damage to plaintiff, which damage will continue as long as said picketing is permitted at plaintiff's premises.

7.

Subsequent to the strike and picketing by defendants against the Consumers Cooperative Association in Clay County, Missouri, the said Association transferred various units of its trucking equipment previously principally stationed at its warehouse and terminal in Clay County, Mis-

souri, to other locations within the state of Kansas and elsewhere, but none of such truck units were transferred to any point within Montgomery County, Kansas. During normal operations and prior to the aforesaid strike and picketing of the defendants directed against the Consumers Cooperative Association of Clay County, Missouri, a number of the aforesaid trucking units of said Association in the usual course of business picked up some merchandise at the premises of the petitioner corporation, and some of said truck units are continuing to make such pick-ups.

The activity sought to be enjoined is the picketing being carried on by the defendants at plaintiff's plant in support of the strike in effect at the Association's plant in Clay County, Missouri.

The defendants argue that the court is without jurisdiction of the cause, it having been pre-empted by the Labor-Management Relations Act, often referred to as the Taft-Hartley Act, asserting that the conduct about which plaintiff complains is either protected or prohibited by the Act, in either of which case this court is pre-empted.

Plaintiff, on the other hand, contends that defendants' conduct is neither protected nor prohibited by the Act, and that unless this court assumes jurisdiction plaintiff is without remedy for defendants' alleged wrong.

The Supreme Court of Kansas has followed the doctrine of pre-emption as enunciated by the Supreme Court of the United States. In a case entitled *Hyde Park Dairies, Inc., v. Local Union 795*, 182 Kan. 440, it is stated, "In determining, therefore, whether an activity is protected or prohibited under sections 157, 158 of the Act (29 USCA, pp. 157-158), a state court need only to determine that the facts reasonably bring the controversy within the sections, and if so, should decline jurisdiction."

Upon a stipulated finding of interstate commerce and the other facts stipulated it is the view of this court that such facts reasonably bring the controversy within the purview of the National Labor Relations Act referred to, and this being the case, that jurisdiction should be declined and the proceedings brought by the plaintiff must be dismissed. Judgment in accord with this memorandum ruling is this day entered.

Signed and dated at Independence, Kansas, on this 11th day of October, 1958.

/s/ Warren B. Grant,
District Judge.

APPENDIX C.

Opinion of Kansas Supreme Court.

Wertz, J.: These actions to enjoin the defendants from maintaining picket lines in the vicinity of plaintiffs' Coffeyville and Lawrence, Kansas, plants and premises were commenced separately—case No. 41,421 in the district court of Montgomery county and case No. 41,422 in the district court of Douglas county. In each case an appeal was taken from the order of the trial court sustaining defendants' demurrer to the plaintiff's evidence. These appeals have been consolidated in this court upon the stipulation by all parties that the decision in case No. 41,422 will govern and constitute the decision in case No. 41,421, and they will be so considered.

Case No. 41,422 was tried upon (1) a stipulation by the parties that all allegations or statements of fact set forth in the petition were true and (2) additional stipulated facts. The allegations of the petition may be summarized as follows: The named defendants (appellees) are officers, business representatives, stewards or other officials or agents of Local Union No. 41 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, which will be hereinafter referred to as the Teamsters Union. The Teamsters Union maintains an office at 116 West Linwood Boulevard, Kansas City, Missouri, and is the representative or collective bargaining agent of certain employees of The Consumers Cooperative Association, hereinafter referred to as CCA.

CCA is a Kansas corporation licensed to do business in the State of Missouri and has its principal office and place of business at 3315 North Oak Trafficway, North Kansas City, Missouri. CCA also has a warehouse at 1500 Iron

Street, North Kansas City, Missouri, and is engaged in the business of purchasing, selling and distributing farm and home supplies to retail farmers' cooperative associations in the middle west.

The collective bargaining contract between CCA and the Teamsters Union expired on or about March 31, 1958. No agreement was reached during the collective bargaining negotiations carried on prior to and subsequent to the expiration of the contract. As a result, on April 18, 1958, the Teamsters Union notified CCA that it was on strike and had instructed certain of its members to picket CCA's warehouse and terminal at 1500 Iron Street. Shortly thereafter, certain of its members stationed themselves in and about the entrances to the premises carrying placards stating, "Truck Drivers and Warehousemen on Strike Against C. C. A., Kansas City, Missouri." On April 22, 1958, other of its members set up picket lines in and about the entrances to CCA's general office building at 3315 North Oak Trafficway. They carried similar placards.

About two and one-half weeks after the strike commenced in Missouri, the Teamsters Union sent the named defendants and other of its personnel from Kansas City, Missouri, to Lawrence, Kansas, where they set up picket lines in and around the entrances to the premises of The Cooperative Farm Chemicals Association (plaintiff-appellant), which is a separate Kansas corporation engaged in the business of manufacturing, processing, storing and distributing agricultural chemicals and fertilizers. This corporation will hereinafter be referred to as the Association. The defendants carried placards containing language identical to that on the placards being carried by the strikers in Kansas City, Missouri.

At the time the picket lines were set up around the Association's premises, all of the defendants knew that

no dispute existed between the Association and any of its employees, that the employees of the Association were validly represented by another union (Local Union No. 5-613 of the Oil, Chemical and Atomic Workers International Union, AFL-CIO), which was the exclusive collective bargaining agent certified by the National Labor Relations Board, and that a valid collective bargaining contract was then in effect covering all of the Association's employees.

Neither the defendants nor the Teamsters Union sought to represent any of the Association's employees or to otherwise bargain or present any demands with respect to the wages, hours or working conditions of such employees. The picket lines were not set up for any of these purposes, but, rather, all of the defendants knew that the public, including the Association's customers, and the drivers of both intrastate and interstate truck lines which normally picked up and delivered the Association's merchandise would be misled and caused to believe that a dispute existed between the Association and its employees. Further, they knew and intended that the drivers of such truck lines would refuse to cross the picket lines. They also knew that the demands for the Association's products were greatest at this particular time. The picketing had its intended effect, in that the drivers of intrastate and interstate truck lines refused to pick up or deliver shipments from the Association's plant, thus seriously disrupting the distribution of such products. The Association could make no concession or other agreement which would in any manner solve or affect the picketing being carried on by the defendants at its Lawrence plant; moreover, it could do nothing which would tend to settle the strike in Missouri.

The Association alleged that it did not have an adequate remedy at law and that the unlawful acts of the de

fendants would be continued indefinitely, resulting in irreparable injury and damage to it. It asked that the defendants be temporarily and permanently restrained and enjoined from maintaining the picket lines.

A temporary restraining order was issued ordering defendants to desist from picketing the Association's premises. The Association executed and filed its temporary restraining order bond to pay the defendants for such damage as they might incur by reason of any wrongful issuance of such order. An agreed statement of facts was filed wherein the parties stipulated as follows: CCA is the owner of seventy-five per cent of the common stock of the Association and Mr. Howard A. Cowden is president and general manager of CCA, as well as president of the Association. The collective bargaining contract signed by the Association with its employees contained the signature of Fred F. Claxton, who was the personnel director of CCA. The collective bargaining contract between CCA and the Teamsters Union included the signature of C. K. Ward, the predecessor of Fred F. Claxton.

The volume of interstate business engaged in by the Association exceeds the minimum jurisdictional limitations required by the National Labor Relations Board in order for the Board to assert jurisdiction.

Subsequent to the strike and picketing against CCA, by the Teamsters Union, CCA transferred various units of its trucking equipment from Missouri to other locations within the State of Kansas, but no such units were transferred to the Association's plant in Lawrence. However, during normal operations prior to the strike, a number of CCA trucking units picked up merchandise at the Association's plant, and some of these units continued to make such pickups during the time the picket lines were maintained.

The defendants demurred to the evidence on the ground that jurisdiction of the subject matter was pre-empted by the Labor Management Relations Act of 1947 and, therefore, the district court was without jurisdiction to issue either the temporary restraining order or an injunction. The demurrer was sustained on this ground and the temporary restraining order was dissolved. Judgment was entered dismissing the action. At that time the defendants orally moved the court to assess damages under the restraining order bond, claiming as the sole item of damage the sum of $500 for attorney fees. It was agreed that if the defendants were entitled to damages and such damages included attorney fees the amount was reasonable. The court ruled that defendants had been damaged in the amount of the attorney fees and sustained the motion. Following the overruling of its motion for a new trial, the Association perfected this appeal.

At the outset, it may be said that the defendants' activity in going from Missouri, the situs of the strike, to Lawrence, where they set up picket lines in and around the entrances to the Association's premises was unlawful as being in violation of G. S. 1957 Supp., 44-809 (13), which provides: "It shall be unlawful for any person . . . (13) To picket beyond the area of the industry within which a labor dispute arises."

Defendants do not contend otherwise. In fact, they admit the picketing was unlawful and take the position that the trial court was without jurisdiction of the subject matter of the action by reason of the so-called federal pre-emption doctrine and, therefore, no state court could grant an injunction regardless of whether the picketing was lawful or unlawful under the provisions of either the state or the federal law. They argue that whether an activity is protected or prohibited by the Labor Management Relations Act of 1947 (hereinafter referred to

as the Act) or whether such activity is neither protected nor prohibited by it must, in the first instance, be determined by the National Labor Relations Board (hereinafter referred to as NLRB) and that such a determination cannot therefore be made by a state court. They further contend that it makes no difference whether such activity is protected or prohibited by the Act or is neither protected nor prohibited because state courts have jurisdiction over only one area in labor relations matters affecting interstate commerce, such area being violence in the labor dispute. In support of this argument defendants cite *Plumbers, Etc., Local 298, A. F. of L. v. County of Door*, U. S., 79 S. Ct. 844, 3 L. Ed. 2d 872, and *San Diego Building Trades Council, Etc. v. Garmon*, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775, commonly referred to as the second Garmon case.

The Association, on the other hand, contends that the defendants' activity was neither protected nor prohibited by the Act and that under such circumstances state courts have repeatedly exercised their jurisdiction to enjoin even peaceful picketing such as is involved in the instant case.

It is now well settled that where labor practices are either protected or prohibited by the Act Congress has pre-empted the field in labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in the NLRB to determine such labor disputes. (*Local Lodge No. 774 v. Cessna Aircraft Co.*, 185 Kan. 183, 187, 188, 341 P. 2d 989, and cases therein cited.)

It is equally well settled that Congress never intended to withdraw, and has not withdrawn, from the states *all* jurisdiction over labor relations matters affecting interstate commerce. (*Garner v. Teamsters Union*, 346 U. S. 485, 486, 74 S. Ct. 161, 98 L. Ed. 228; *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 480, 75 S. Ct. 480, 99 L. Ed. 546; *Machinists v. Gonzales*, 356 U. S. 617, 619, 78 S. Ct. 923, 2 L. Ed. 2d 1018.)

In the Weber case, *supra*, it was said at pages 480-481:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters Union*, supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation."

In the Gonzales case, *supra*, at page 619, the Court stated:

> "Congress withdrew from the States much that had theretofore rested with them. *But the other half of what was pronounced in Garner—that the Act 'leaves much to the states'—is no less important.* See 346 U. S., at 488. The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation. See *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 474-477." (Emphasis supplied).

In one of the most recent cases dealing with this subject, the Supreme Court again recognized that not all jurisdiction has been withdrawn from the states. (*San Diego Building Trades Council, Etc., v. Garmon*, supra.) The

Court quoted with approval the language in the Weber case, *supra*, which has been set forth above. Thus, the Supreme Court did not intend to alter or foreclose the rules announced in the Garner, Weber and Gonzales cases, *supra*, and defendants' contention that the Garmon case, *supra*, has limited state jurisdiction to the area of violence in labor relations matters is without merit.

It appears the underlying principle of the pre-emption rule is that there should not be two conflicting remedies brought to bear on the same subject. In other words, if both federal and state remedies are available, the state should decline to exercise its remedy and thereby avoid frustration of national labor policies. (*Garner v. Teamsters Union*, supra; *Weber v. Anheuser-Busch, Inc.*, supra; *Machinists v. Gonzales*, supra; *San Diego Building Trades Council, Etc., v. Garmon*, supra.)

Where the activity is neither protected nor prohibited by the Act and is not federally regulated, then the NLRB has no power to entertain the action and, therefore, the activity is "governable by the State or it is entirely ungoverned." In such cases the Supreme Court has declined to find an implied exclusion of state power. (*Auto. Workers v. Wis. Board*, 336 U. S. 245, 254, 69 S. Ct. 516, 93 L. Ed. 651.)

Thus, it is clear that if the picketing in the instant case is not protected or prohibited by the Act, then the district court had jurisdiction and the temporary restraining order was rightfully issued.

Although it may well be argued that no "labor dispute" exists under the facts presented in the instant case (*Gomez v. United Office and Professional Workers*, 73 F. Supp. 679), we need not decide the point but shall proceed to determine whether the activity involved herein is either protected or prohibited by the Act. In making such a

determination, the purpose and the method of the activity are all important. (*Hyde Park Dairies v. Local Union No. 795*, 182 Kan. 440, 321 F. 2d 564.)

There can be little question as to the purpose of the picketing of the Association's premises. A review of the stipulated facts clearly reveals that there was no dispute between the Association and its employees, that neither the defendants nor the Teamsters Union sought anything from the Association and had no intention of inducing, encouraging or persuading such employees to engage in any concerted or other activity, that there was no attempt, on the part of defendants to organize the Association's employees or to represent them for collective bargaining purposes, and that the picketing had not the remotest connection with working condition or relations between the Association and its employees.

Furthermore, there is nothing in the record to indicate defendants intended that the Association's employees respect the picket line or that any of such employees did so. The Association and its employees were not performing "struck" or "farmed out" work for CCA and were helpless to intervene in the defendants' dispute with CCA in order to stop the picketing. Apparently, defendants had not such intent but, rather, intended to inflict economic harm on the Association by causing drivers of any truck lines serving the Association to refuse to pick up or deliver merchandise and thereby cause CCA to suffer economic loss indirectly through its stock ownership.

It should also be noted there is nothing in the record tending to show that the Association was doing business with CCA; that is, there is no evidence indicating either corporation bought, sold or handled in any way the products handled by the other corporation. Moreover, there is no evidence to the effect that the Association controlled the labor policies of CCA, or vice versa, with the single

exception that an official signed collective bargaining contracts on behalf of each corporation.

Under such circumstances, can it be said that the picketing was protected by the Act? We think not. If the picketing in the instant case is to be protected it must be by reason of Section 7 of the Act (29 U. S. C. A., Sec. 157). The purpose of this provision was discussed in *Auto Workers v. Wis. Board*, supra, and it was said at pages 257 and 258:

> "In the light of labor movement history, the purpose of the quoted provision of the statute becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the National Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. *But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert.*" (Emphasis supplied.)

Thus, not all concerted activities may be labeled as protected by Section 7 but only those activities which are legal or lawful in the first instance. (*N. L. R. B. v. Dallas General Drivers, etc., Local No. 745*, 264 F. 2d 642, 646; *Auto Workers v. Wis. Board, supra*, p. 257; *Milwaukee Boston Store Co. v. Amer. Fed. of H. W.*, 269 Wis. 338, 69 N. W. 2d 762; *Adams Dairy v. Burke* (Mo.), 293 S. W. 2d 281; certiorari denied 352 U. S. 969, 77 S. Ct. 360, 1 L. Ed. 2d 323.) In the instant case, it is admitted that the picketing was unlawful and, therefore, it was not protected by

the Act unless defendants' contention that the Association was an "ally" of CCA or a "non-neutral" is correct.

The facts upon which defendants rely to sustain this contention are as follows: (1) CCA replaced some of its striking drivers with non-union drivers, some of whom continued to serve the Association; (2) CCA owns seventy-five per cent of the Association's common stock; (3) the president of CCA is also president of the Association; and (4) the Association's collective bargaining agreement with its employees was signed on its behalf by one or two of the same men who signed such an agreement with the Teamsters Union on behalf of CCA.

The trouble here is that mere common ownership and management are not in and of themselves sufficient to change a neutral employer into an "ally" or a "non-neutral employer." (*J. G. Roy & Sons Co. v. National Labor Relations Bd.*, 251 F. 2d 771; *Gomes v. United Office and Professional Workers*, 73 F. Supp. 679; *N. L. R. B. v. Dallas General Drivers, Etc., Local No. 745*, supra, p. 647.) We conclude that the picketing of the neutral employer in the instant case was not protected by the Act. Therefore, if the state court is without jurisdiction, it must be because such picketing is prohibited by the Act.

Section 8 (b) (4) of the Act (29 U. S. C. A., Sec. 158 (b)) is the only possible provision under which the picketing could be prohibited as an unfair labor practice. It provides in relevant part as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . . . .
>
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a *strike or a concerted refusal in the course of their employment*, to use, manufacture, process, transport,

> or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, *or to cease doing business with any other person;* . . . ." (Emphasis supplied.)

It has been held that the provisions of the mentioned section "are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer." (*Labor Board v. Rice Milling Co.*, 341 U. S. 665, 670, 671, 71 S. Ct. 961, 95 L. Ed. 1277). In that case, the Court went on to say at page 671:

> "That language contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill. There was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread than that already described. There were no inducements or encouragements applied elsewhere than on the picket line. The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by Sec. 8 (b) (4). Insofar as the union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the union sought *concerted* conduct by such other employees. Such efforts also fall short of the prescriptions in Sec. 8 (b) (4). In this case, therefore, we need not determine the specific objects toward which a union's encouragement of concerted conduct must be directed in order to amount to an unfair labor prac

tice under subsection (A) or (B) of Sec. 8 (b) (4). A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of Sec. 8 (b) (4), and they do not here."

In *Joliet Contractors Ass'n v. National Labor Rel. Bd.*, 202 F. 2d 606, it was said that the provisions of section 8 (b) (4) are violated only when the employees of a neutral employer are induced or encouraged to strike or engage in a concerted refusal in the course of their employment to handle certain materials where an object thereof is to force the neutral employer to cease doing business with the primary employer or cease handling such employer's products.

In discussing section 8 (b) (4), the court, in *Retail Fruit & Veg. Clerks U. v. National Labor Rel. Bd.*, 249 F. 2d 591, said at page 594:

> "As we understand this statute there are two necessary requirements to find a violation of it. These are: (1) Independent *neutral* employers . . ., and (2) the union must have as an object of its picketing (or other activity) the inducement or encouragement of the *neutral employees* to engage in a concerted refusal to work for their *neutral employer*, so that the neutral employer will cease doing business with the *primary employer*, which indicates that the neutral employer must be doing some sort of business with the primary employer."

Thus, it is clear that in order for there to be a violation of section 8 (b) (4) such as will vest exclusive jurisdiction in the NLRB, the picketing must be aimed at an inde

pendent neutral employer and the object of the picketing must be to induce or encourage the employees of the neutral employer to engage in a strike or other concerted refusal in the course of their employment to handle certain products where the object thereof is to force the neutral employer to cease handling such products or to cease doing business with the primary employer. The coercion by the union must be directed at the neutral employees before it can be declared a violation of section 8 (b) (4). Coercion or threats addressed directly to the neutral employer are not within the proscription of the statute (*Rabouin v. National Labor Relations Board*, 195 F. 2d 906, 911, 912; *Adams Dairy v. Burke*, supra, p. 294; *Milwaukee Boston Store Co. v. Amer. Fed. of H. W.*, supra, p. 773).

We have already determined that the Association is a neutral employer and must now determine whether the picketing meets the second requirement. We do not think so. In the first place, the object of the picketing was not to induce or encourage concerted activity on the part of the Association's employees and, in fact, such employees did not engage in any concerted activity. They continued to work even though they were required to cross defendants' picket lines in order to do so. It is true that certain drivers of truck lines serving the Association refused to cross the picket lines, but even then there was no concert of action on their part, inasmuch as some of such drivers did cross the picket lines. Furthermore, the drivers of the trucks were *not employees of the Association*.

In the second place, as we have previously stated, there is nothing in the evidence which indicates that the Association was doing business with CCA. The neutral employer must be doing some business with the primary employer or there is no violation of section 8 (b) (4) (*Retail Fruit & Veg. Clerks U. v. National Labor Rel. Bd.*, supra).

The picketing was therefore neither protected nor prohibited by the Act, and, as we have stated above, under the circumstances state courts are free to exercise jurisdiction. It follows that the temporary restraining order was rightfully issued and the trial court erred in sustaining defendants' demurrer to plaintiff's evidence. Consequently, defendants are not entitled to attorney fees as an item of damages. The judgment of the trial court is reversed and the cause is remanded in case No. 41,422 and case No. 41,421, with instructions to enter judgment for the plaintiff.

It is so ordered.

APPENDIX D.

Journal Entry.

Now on this 20th day of May, the same being a regular judicial term of this Court, the above entitled case comes on for hearing for temporary injunction upon a petition of plaintiffs filed herein. The plaintiffs appeared through their attorneys Watson, Ess, Marshall and Enggas and Stevens and Brand and defendants appeared through their attorneys McCullough & Kimbrough.

Whereupon counsel for the parties announced to the Court that this matter would be submitted to the Court upon stipulation of facts, demurrer to evidence and brief in support of the position by each of the parties.

Whereupon the Court, by agreement among the parties, continued the matter until the 31st day of May, 1958.

Whereupon the parties did submit to the Court stipulations of fact, defendants' demurrer to the evidence, defendants' brief in support of demurrer to the evidence and plaintiff's brief in opposition to defendants' demurrer to the evidence.

Whereupon the parties rested their cause and the same was submitted to the Court. The Court announced that it will take said demurrer under advisement and as stated and agreed by the parties, the restraining order issued herein will remain in effect pending the decision of the Court.

Thereafter and on the 3rd day of October, 1958, the Court having studied the stipulation of facts and the briefs as submitted by counsel for each of the parties finds that the demurrer to the evidence of the defendants should be sustained; that this Court must decline jurisdiction and

dismiss the proceedings by the plaintiff. The Court's memorandum decision on demurrer to evidence signed and dated at Lawrence, Kansas, on the 19th day of September, 1958, is herewith incorporated and made a part of this Journal Entry of Judgment as fully as if it were set out herein.

It Is Therefore Considered, Ordered, Adjudged and Decreed that defendants' demurrer to the evidence be sustained and that the plaintiff's petition be dismissed. Further it is ordered that temporary restraining order as herein issued be dissolved.

It Is Further Ordered, Adjudged and Decreed that the plaintiffs shall pay the costs of this action.

It Is So Ordered.

s/ Frank R. Gray,
Judge.

APPENDIX E

Journal Entry.

Now on this 3rd day of October, 1958, the above entitled case comes on for hearing on the oral motion of the defendants for the court to assess costs and damages on plaintiff's bond filed in this entitled action. The plaintiffs appeared through their attorneys Watson, Ess, Marshall and Enggas and Stevens and Brand and defendants appeared through their attorneys McCullough & Kimbrough.

Whereupon counsel for the parties announced to the court that they were ready to hear the said oral motion to assess costs and damages.

Whereupon the court heard arguments in support of the motion to assess costs and damages and heard arguments in opposition to the motion to assess costs and damages.

Whereupon the parties rested their cause and the same was submitted to the court. The court announced that it would take said matter to assess costs and damages under advisement.

Thereafter and on the 31st day of October, 1958, the court having been fully advised in the premises, finds that the motion to assess costs and damages should be sustained as against the plaintiff. That the liability of the surety be not forfeited for want of notice. That the damages of attorney fees in the amount of $500 should be assessed and incorporated as part of the costs of this action.

It Is Therefore Considered, Ordered, Adjudged and Decreed that the defendants' motion to assess costs and damages be sustained.

It Is Further Ordered, Adjudged and Decreed that the defendants recover in addition to costs of this action $500 allowed as attorney fees, the same to be assessed as costs against the plaintiff.

It Is So Ordered.

APPENDIX F

Journal Entry.

Now on this 12th day of May, the same being a regular judicial term of this Court, the above entitled case comes on for hearing for temporary injunction upon a petition of plaintiffs filed herein. The plaintiffs appeared through their attorneys, Watson, Ess, Marshall and Enggas and Clement Hall, and defendants appeared through their attorneys, McCullough & Kimbrough.

Whereupon counsel for the parties announced to the Court that this matter would be submitted to the Court upon stipulation of facts, demurrer to evidence and brief in support of the position by each of the parties.

Whereupon the Court, by agreement among the parties, continued the matter until the 6th day of June, 1958.

Whereupon the parties did submit to the Court stipulations of fact, defendants' demurrer to the evidence, defendants' brief in support of demurrer to the evidence and plaintiff's brief in opposition to defendants' demurrer to the evidence.

Whereupon the parties rested their cause and the same was submitted to the Court. The Court announced that it will take said demurrer under advisement and as stated and agreed by the parties, the restraining order issued herein will remain in effect pending the decision of the Court.

Thereafter and on the 11th day of October, 1958, the Court having studied the stipulation of facts and the briefs as submitted by counsel for each of the parties finds that the demurrer to the evidence of the defendants should be sustained: that this Court must decline jurisdic-

tion and dismiss the proceedings by the plaintiff. The Court's memorandum decision on demurrer to evidence signed and dated at Lawrence, Kansas, on the 11th day of October, 1958, is herewith incorporated and made a part of this Journal Entry of Judgment as fully as if it were set out herein.

It Is Therefore Considered, Ordered, Adjudged and Decreed that defendants' demurrer to the evidence be sustained and that the plaintiff's petition be dismissed. Further it is ordered that temporary restraining order as herein issued be dissolved.

It Is Further Ordered, Adjudged and Decreed that the plaintiffs shall pay the costs of this action.

It Is So Ordered.

s/ Warren B. Grant,
Judge.

APPENDIX G

Journal Entry.

Now on this 3rd day of March, 1939, the above entitled case comes on for hearing on the motion of the defendants for the court to assess costs and damages on plaintiff's bond filed in this entitled action. The plaintiffs appeared through their attorneys, Watson, Ess, Marshall and Enggas and Clement H. Hall, and defendants appeared through their attorneys, McCullough & Kimbrough.

Whereupon counsel for the parties announced to the court that they were ready to hear the said motion to assess costs and damages.

Whereupon the court heard arguments in support of the motion to assess costs and damages and heard arguments in opposition to the motion to assess costs and damages.

Whereupon the parties rested their cause and the same was submitted to the court.

The court having been fully advised in the premises, finds that the motion to assess costs and damages should be sustained as against the plaintiff. That the liability of the surety be not forfeited for want of notice. That the damages of attorney fees in the amount of $300 should be assessed and incorporated as part of the costs of this action, as per stipulation of the parties.

It Is Therefore Considered, Ordered, Adjudged and Decreed that the defendants' motion to assess costs and damages be sustained.

It Is Further Ordered, Adjudged and Decreed that the defendants recover in addition to costs of this action $300 allowed as attorney fees, the same to be assessed as costs against the plaintiff.

It Is So Ordered.

/s/ Warren B. Grant,
Judge.

APPENDIX I.

Article I, Section 8 of the United States Constitution in material part provides:

> "The Congress shall have power . . . to regulate commerce . . . among the several states . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Article VI, Section 2 of the United States Constitution in material part provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Section 8 (b) (4) of the National Labor Relations in material part provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . . . .
>
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other per-

son to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person: (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959,

No. 673.

ROY L. WILLIAMS et al.,
Petitioners,

vs.

THE COOPERATIVE FARM CHEMICALS ASSOCIATION et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas.

BRIEF OF RESPONDENTS IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

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Petitioners;

vs.

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas.

BRIEF OF RESPONDENTS IN OPPOSITION.

Petitioners (called "defendants" herein) have misapprehended, overlooked, or ignored facts and circumstances which necessitate a denial of a writ of certiorari in this case. The additional portions of the record certified by plaintiffs-respondents demonstrate a lack of jurisdiction for want of a final judgment and for want of a live case or controversy involving a federal question.

SUPPLEMENTAL STATEMENT.

Defendants' statement ignores the controlling fact that the judgment or decree here involved granted a *temporary injunction.* After the temporary restraining order and order to show cause was issued at the outset by the trial court (R. 20[1]), the parties entered into a stipulation of facts for the purpose of enabling the trial court to rule on the order to show cause why a temporary injunction should not be granted. Defendant Union's demurrer in opposition to the issuance of the temporary injunction was based solely on the assertion that jurisdiction had been pre-empted to the National Labor Relations Board by the Labor Management Relations Act (R. 26-8). The trial court sustained the demurrer (R. 42-3), thus refusing to issue a temporary injunction. The Supreme Court of Kansas reversed the judgment and issued its mandate directed to the trial court. In accordance with the mandate, the trial court entered a Journal Entry dated December 24, 1959, granting a temporary injunction, "pending further hearing and order of this Court" (Resp. R. 1-3). The injunction was to be effective "until the hearing of said cause and application for permanent injunction and order therein" (Resp. R. 3).

Thereafter plaintiff, The Cooperative Farm Chemicals Association, filed in the cause a Dismissal dated January 18, 1960, which recited that defendants' acts had long since

1. Plaintiffs have not been supplied with a copy of the record. References to defendants' record are gleaned from defendants' statement where possible. References herein to proceedings in the trial court are to proceedings by plaintiff, The Cooperative Farm Chemicals Association, in the District Court of Douglas County, Kansas. Similar proceedings have been taken in Montgomery County, Kansas, where the Dismissal in behalf of plaintiff, Cooperative Refinery Association, is now pending.

been discontinued and there was no evidence of any intention on the part of defendants to renew them (Resp. R. 4).

The trial court treated plaintiff's dismissal as a "motion to dismiss" and required that the "motion" be heard by the court on February 4, 1960. At the hearing defendants' attorneys stipulated in open court that the original dispute which gave rise to the picketing had terminated while the temporary restraining order was still in effect, and that after the trial court sustained defendants' demurrer, neither the defendant Union nor any of its members at any time picketed plaintiff's plant (Resp. R. 5-6).

The trial court has the "motion" to dismiss under advisement.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. The decree is not final: The proceedings below involve only the question of plaintiffs' right to a temporary injunction and the proceedings culminated in temporary injunctions. Stipulations of facts were entered into in the trial court solely for the purpose of ruling on the jurisdiction of the court to issue a *temporary injunction*. The Supreme Court of Kansas, in reversing the judgment for defendants, determined that plaintiffs were entitled to temporary injunctions and temporary injunctions pending a hearing were issued in execution of that Court's mandate (Resp. R. 1). That there was no dispute as to the terms of the decree is evidenced by the approval of the Journal Entry as to form by defendants' counsel (Resp. R. 3). The cases are now pending on plaintiffs' Dismissal which would, of course, terminate the temporary injunction.

Under these circumstances, there is no final, reviewable decree which would sustain the jurisdiction of this

Court. *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U.S. 178 (1952), is controlling. There, as here, a state court issued a temporary injunction. After hearing, the union's motion to dissolve the temporary injunction was denied (See 57 So.2d 112, 114). The union's motion there, as here, was based on the premise that the state court had no jurisdiction by reason of the pre-emption doctrine. The Supreme Court of Alabama affirmed the decree, leaving the temporary injunction intact. Certiorari was granted and then dismissed as improvidently granted. The Court held that the decree of the Supreme Court of Alabama was not a final judgment or decree within the meaning of 28 USCA, § 1257, because it merely granted a temporary injunction. The Court stated (pp. 180-181):

> "The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in *Gibbons* v. *Ogden*, *supra*. There is no room here for interpretation. The rule remains unchanged.
>
> True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari. *Baldwin Co.* v. *Howard Co.*, 256 U.S. 35, 40.
>
> It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocu-

tory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case."

To the same effect is *Williams et al.* v. *Quill et al.*, 303 U.S. 621 (1938), in which the Court dismissed an *appeal* from the denial of a temporary injunction by the state court for want of a final judgment.

2. There is no actual controversy concerning any federal issue: After the issuance of the temporary injunction herein, plaintiffs filed Dismissals of the actions which would, of course, automatically terminate the temporary injunctions. It was stipulated in open court that the basic controversy which provoked the picketing had been settled, and that there had been no picketing at plaintiff's plant at any time since the district court had sustained the demurrer to the evidence on October 3, 1958, sixteen months prior to the hearing on the dismissal (R. 42-3; Resp. R. 5-6).[2]

These developments demonstrate the absence of any live controversy involving a federal question which would be reviewable by this Court. The conditions which gave rise to the controversy have changed completely. Plaintiffs dismissed because conditions were so changed as to make a temporary injunction unnecessary and meaningless. Termination of the temporary injunctions will give defendants all the relief they have sought. The federal question is wholly academic. The mere threat of future Union activity (Resp. R. 6), does not render the controversy any

2. The decree granting a temporary injunction was issued to comply with the mandate of the Supreme Court of Kansas. Defendants have never sought a stay of proceedings.

less moot. *Local No. 8-6, Oil, Chemical & Atomic Workers International Union, AFL-CIO,* v. *Missouri,* U.S. , 28 LW 4095 (1960).

The defendants have frankly conceded that dismissal of the case will render this controversy moot. In their brief in the district court in opposition to dismissal defendants state (pp. 11-12):

> "It is clear that granting the motion to dismiss would moot the injunctive features of the case regardless of the propriety or the power of the court to grant such a motion. *U. S.* v. *Shipp,* 203 U.S. 563, 573-574; *Director of Prisons* v. *Court of First Instance,* 239 U.S. 633, 634."

This concession destroys defendants' right to seek certiorari. The additional Union contention in the district court that the separate judgment for damages in this case would independently support a petition for writ of certiorari (Br. 12) has no merit and finds no support in the cases cited by the Union.[3]

In this case, damages were sought (R. 39) and granted (R. 44-5) *under the state law of Kansas.* Any damage issue in this case is simply an issue of state law. This the Union impliedly concedes, for its Petition does not seek review of the damage question or assign it as a reason for granting the writ.

---

3. *Tullock* v. *Mulvane,* 184 U.S. 497, 509-514, involving liability on an injunction bond in connection with injunction proceedings brought in Federal Court. The Court specifically held that liability on the bond was a federal question (see p. 504).

Textile Workers Union v. *Lincoln Mills,* 353 U.S. 448, 459, was a suit in Federal District Court to compel arbitration under Sec. 301(a) of the Labor Management Relations Act of 1947. Again, the Supreme Court held that the damage questions involved in the case were questions of federal law (p. 456).

The alleged pendency of incidental damage issues can not give life to the present petition. See *Alejandrino* v. *Quezon*, 271 U.S. 528, 533 (1926).

To paraphrase the Court's language in *Local No. 8-6, Oil, Chemical & Atomic Workers International Union, AFL-CIO*, v. *Missouri*, U.S. , 28 LW 4095, 4097 (1960), any judgment herein "'would be wholly ineffectual for want of a subject matter on which it could operate. * * * [A reversal] would ostensibly require something to be done which had already taken place. * * * To adjudicate a cause which no longer exists is a proceeding which this Court has uniformly refused to entertain.'"[4]

See also to the same effect: *United States* v. *International Union, United Mine Workers of America*, 190 F.2d 865, 872-3 (D.C. Cir. 1951); *Minn. & St. L. Ry. Co.* v. *Pacific Gamble Robinson Co.*, 181 F.2d 812, 814 (8th Cir. 1950). Cf. *Hershel California Fruit Products Co.* v. *Hunt Foods, Inc.*, 221 F.2d 797 (9th Cir. 1955).

3. No novel or important questions are involved: Assuming *arguendo* that jurisdiction to review the judgment by certiorari exists, defendants have demonstrated no compelling considerations which would warrant the issuance of the writ in this case, particularly in view of the circumstances already discussed. The Supreme Court of Kansas in this case recognized and applied the decisions of this Court in the *Garner, Weber, Gonzales, Garmon* line of cases. It ruled that the "activity" disclosed by the stipulated facts was neither protected nor prohibited by federal law, ap-

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4. This is *not* a situation in which the Union, opposed by the company, seeks dissolution of a permanent injunction against it on the ground that the underlying controversy has been settled. Here, the company, and presumably the Union also, desire to terminate a temporary injunction.

parently basing its decision on what it deemed to be "compelling precedent applied to essentially undisputed facts". *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246 (1959).

The state court, of course, had not only the right but the duty to determine the question of its own jurisdiction. See *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.*, 348 U.S. 511 (1955). Defendants' contention seems to be that where, as here, the state court bases its ruling on federal precedent, the *Garmon* decision compels it to look only to Board decisions, even though those decisions have been reversed by the courts of appeal and are not the law. The implication that such discredited Board decisions are controlling misinterprets *Garmon* and would make a mockery of the statutory judicial review of administrative rulings of the Board.

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5. *Garmon*, of course, involved activity which had been adjudicated to be an 8(b)(2) unfair labor practice. Further, the Court recognized a residual state power to regulate conduct touching interests deeply rooted in local feeling and responsibility (p. 244).

CONCLUSION.

No final decision in an existing case or controversy is involved in this case, and the petition for certiorari should be denied.

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OCTOBER TERM, 1959.

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ROY L. WILLIAMS et al.,
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vs.

THE COOPERATIVE FARM CHEMICALS ASSOCIATION et al.,
Respondents.

PETITIONERS' REPLY BRIEF

In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Kansas.

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PETITIONERS' REPLY BRIEF

In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Kansas.

ARGUMENT.

I. THE INJUNCTIONS ENTERED BY THE TRIAL COURTS PRESENT FINAL JUDGMENTS IN A JUSTICIABLE CAUSE.

Respondents' answering brief to the petition for certiorari indicates that portions of the proceedings, subsequent to the mandate of the Kansas Supreme Court, have been

filed as a part of the record in this Court. To permit full consideration of the significance of such proceedings, Petitioners have, pursuant to Rule 21 (3), filed a certified copy of *all* proceedings occurring subsequent to the mandate of the Kansas Supreme Court.[1]

A. The injunctions entered by the trial courts, though temporary in form, are "final" when tested against the policy of 28 U. S. C., Sec. 1257.

That state court judgments lacking in finality will not be considered here is, of course, conceded. Nor do Petitioners dispute the proposition that temporary injunctions are, generally speaking, non-final within the meaning of 28 U. S. C., Sec. 1257. But "it is no longer the rule that the face of the judgment is determinative of whether it is final." *Gospel Army v. Los Angeles*, 331 U. S. 543, 546.

Congress, in enacting 28 U. S. C., Sec. 1257, limited this Court's power to review state court judgments "lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions." *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 381. When tested against this policy, the injunctive decrees now before the Court are final.

Respondents, subsequent to the mandate of the Kansas Supreme Court, filed with the District Court for Douglas County a document entitled "Dismissal." As the Respondents concede (Resp. Br., pg. 3), the trial court treated it as a motion to dismiss, and on February 4, 1960, a hearing on the motion was held. During the course of the hearing the

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[1] Since consideration of the post-mandate proceedings may be dependent upon a petition for writ of certiorari directed to the Kansas Supreme Court *and* to the District Courts for Douglas and Montgomery Counties, Petitioners ask that the petition be so viewed.

following colloquy between the court and counsel for the Respondents took place:

> "The Court: Before you quit I would like to ask one question. In your preliminary remarks or statement I got the impression that it was your interpretation of the case that it was [not][2] submitted on its merits. I think in a limited sense that may be a true statement, but in the overall sense I think the case was submitted on the merits on an agreed statement of facts, to which statement of facts there was a demurrer to the evidence. To that extent I construe it as a case being submitted on merits.
>
> "Mr. Spencer: On an application for temporary injunction.
>
> "The Court: Under the pleadings.
>
> "Mr. Spencer: That is correct, I will agree to that" (R. 274).

A review of Kansas precedent demonstrates the accuracy of the trial court's impression that the case was "submitted on the merits."[3]

In Kansas, as elsewhere, "the nature of the order is not determined by its name or label but by its effect." *Allen v. Gilliten*, 156 Kan. 550, 552, 134 P. 2d 631, 633. In this case, comprehensive factual stipulations were agreed upon

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[2] Judging by the transcript of the hearing, the court reporter was quite hard of hearing.

[3] Respondents' motion to dismiss was taken under advisement by the District Court for Douglas County. No ruling had been issued at the time this brief was filed.

Copies of correspondence between counsel indicating that Respondents desire to hold their motion for dismissal of the proceedings in the District Court for Montgomery County in abeyance, pending this Court's ruling on the petition for certiorari, have been filed with the Clerk. This correspondence is not a part of the record and is therefore submitted only in connection with the issue of mootness.

and a demurrer to this evidence was submitted. As in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 73-74, the factual stipulations are binding and preclude a meaningful relitigation of the cause. *Broyles v. Order of United Commercial Travelers*, 155 Kan. 458, 459, 126 P. 2d 212, 213. Since all of the legal and factual issues in this case have been resolved, so far as the Kansas courts are concerned, an additional "trial" would amount to nothing more than forensic exercise. Finality, not ritual, is the test of reviewability.

B. The injunction proceedings have not been mooted by either the Petitioner Union's decertification as bargaining agent or by Petitioners' observance of the injunctive decrees.

Respondents' brief asserts that it was "stipulated" in the trial court that the dispute between the parties had been "settled" (Resp. Br., pg. 5). The record does not support this assertion. Petitioners agreed that the Union had been decertified following a National Labor Relations Board election. However, this hardly constitutes the settlement of a dispute.

The affidavit of Petitioner Williams[4] clearly demonstrates that, while the *reason detre* of the dispute is now organizational rather than contractual, the controversy is none the less real. And since it was the *situs* of the picketing rather than the object of the picketing which rendered the activity unlawful under state law (R. 234), it is immaterial to inquire whether the Petitioners' object or purpose has changed during the course of the litigation.

[4] The original of this affidavit has been filed with the Clerk of this Court, and a copy has been served upon counsel for Respondent. The affidavit is outside the record and is submitted only in connection with the mootness issue.

The state law as construed below (R. 234) and the decree entered below (R. 267-268) prohibit Petitioners from picketing at the premises of the commonly-owned and managed corporations regardless of the object which the Petitioners seek to achieve.

Respondents alternatively assert that the failure of Petitioners to picket during the pendency of this litigation demonstrates its mootness. An *ex parte* restraining order, issued on May 9, 1958, was in effect until October 3, 1958, when the trial court's judgment sustaining Petitioners' claim of pre-emption was rendered. The injunction was reinstated pursuant to the mandate of the Kansas Supreme Court on December 24, 1959. Petitioners' respect of these orders does not evidence mootness. *Bakery Sales Drivers Union v. Wagshal*, 333 U. S. 437, 442.

As a result of an election held on February 9, 1959, the Petitioner Union was decertified by the National Labor Relations Board (Williams' affidavit). The election bar rule precluded the Petitioners from invoking the NLRB's election procedures prior to February 9, 1960, and the NLRB's Curtis Bros. doctrine (119 NLRB 232, rev'd . . . F. 2d . . ., *cert. granted*, 359 U. S. 965) condemned even primary picketing during that period. But for the state decree presently in effect, Petitioners would have been permitted to picket in support of either organizational or recognition purposes upon the expiration of the one year period following the conduct of the election. See: National Labor Relations Act, as amended, Section 8 (b) (7) (B), 29 U. S. C., Sec. 158 (b) (7) (B). Certainly, if, as *Wagshal* teaches, obedience to a court decree does not moot a cause, respect for the national labor policy, as declared by the NLRB, should not be considered evidence of mootness.

II. THE DAMAGE JUDGMENTS ENTERED BY THE TRIAL COURTS, WHICH WERE REVERSED BY THE KANSAS SUPREME COURT, INDEPENDENTLY SUPPORT THIS PETITION.

The damage judgments entered in favor of the Petitioners by the trial courts are set forth in Appendices E, pp. 41-42, and G, pp. 45-46, of the petition. As the petition indicates (pp. 6-7), Petitioners seek review of the single mandate of the Kansas Supreme Court which controls the disposition of the proceedings in the two trial courts. Since the single mandate of the Kansas Supreme Court is properly before this Court, it is submitted that those portions of the mandate reversing the award of damages in favor of Petitioners are necessarily here for this Court's review. To the extent that a separate specification of error directed to that part of the mandate reversing the award of damages may be required, Petitioners move the Court to treat this brief as such specification.[5]

A. The damage judgments present federal questions reviewable here.

Under familiar principles, Kansas permits recovery of the *reasonable* value of attorneys' fees incurred in defending an application for an injunction. Annot., Injunction Bond—Attorneys Fees, 164 A. L. R. 1088, 1099-1100. Both the judgments entered by the trial courts (Pet., pp. 41, 45)[6] and the decisions of this Court (*e. g., Springfield v. Crawfordsville State Bank*, 231 U. S. 541, 542) demonstrate that a judgment for a reasonable attorneys' fee is an award of damages. Such damage awards, in an appro-

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[5] A signed copy of the brief has been filed with the Clerk. Counsel for Respondent have been specifically advised of the motion.

[6] E. g., the judgment of the District Court for Douglas County provides (Pet., pg. 41): "that the damages of attorney fees in the amount of $500 should be assessed."

priate case, are cognizable here. *Tullock v. Mulvane*, 184 U. S. 497, 509-514. This is such a case.

The controlling legal inquiry to be made in this case is whether the doctrine of federal pre-emption bars the exercise of state jurisdiction. The District Courts for Douglas and Montgomery Counties answered this question affirmatively and therefore awarded damages, totaling $800, against the Respondents. On appeal, the Kansas Supreme Court answered the question in the negative and, accordingly, reversed the award of damages. Thus, here, as in *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, the determination of a federal question is dispositive of the litigation. In these circumstances, the damage issue is federal in character and reviewable here. *Cf. Fox River Paper Company v. Railroad Commission*, 274 U. S. 651, 653-654.

B. **Since the damage judgments are independently cognizable here, a finding that the injunctive aspects of the case are either moot or unripe for review is not determinative.**

Should the Court conclude that the injunctive aspect of this litigation is either moot or reposed in a non-final limbo, it is nevertheless submitted that the damage judgments adequately and independently support the petition. Respondents do not, and indeed could not, contend that the damage judgments lack finality.

The alleged mootness of the injunction proceedings is not an obstacle to a review of the damage issue presented in this case. Petitioners seek "a monetary award"; hence, "the case is a continuing controversy." *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 459.[7]

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[7] *Oil Workers v. Missouri*, ... U. S. ..., relied upon by Respondents (Resp. Br., pg. 7) is therefore inapposite. Were this Court to reverse the judgment below, Petitioners would be entitled to recover at least $800 damages.

For the foregoing reasons, the petition for writ of certiorari should be granted.

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